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Attorneys for Union/Petitioner
TEAMSTERS LOCAL 439

**UNITED STATES OF AMERICA**

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**REGION 32**

| | |
|---|---|
| FEDEX FREIGHT, INC.,<br><br>Employer,<br><br>and<br><br>INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 439,<br><br>Union/Petitioner. | Case No. 32-RC-144041<br><br>**NOTICE OF ERRATA TO PETITIONER'S POST-HEARING BRIEF IN OPPOSITION TO OBJECTIONS**<br><br>Hearing Dates: June 8-10, 2015<br>Hearing Officer: Alexander M. Hajduk |

TO THE NATIONAL LABOR RELATIONS BOARD AND FEDEX FREIGHT, INC., AND ITS COUNSEL OF RECORD:

Please take notice that Petitioner's Post-Hearing Brief in Opposition to Objections filed on June 17, 2015, contained a formatting error on page 17, line 25. There is another formatting error on page 20, line 21. The corrected brief is attached hereto as Exhibit A.

Dated: June 18, 2015.

BEESON, TAYER & BODINE, APC

By: _____
COSTA KERESTENZIS
STEPHANIE PLATENKAMP
Attorneys for Union/Petitioner

## PROOF OF SERVICE

## STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I declare that I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to the above-referenced action. My business address is 520 Capitol Mall, Suite 300, Sacramento, California, 95814-4714. On this day, I served the foregoing:

**NOTICE OF ERRATA TO PETITIONER'S POST-HEARING BRIEF IN OPPOSITION TO OBJECTIONS**

☒ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Sacramento, California.

☐ By Personal Delivering a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ By Overnight Delivery to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ By Facsimile Transmission to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☒ By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Mark S. Ross
Keahn N. Morris
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I declare under penalty of perjury that the foregoing is true and correct. Executed June 19, 2015, in Sacramento, California.

Annette Kenney

# EXHIBIT A

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## INTRODUCTION

This matter is before the Hearing Officer, Alexander M. Hajduk, on post-election Objections filed by the Employer, FEDEX FREIGHT, INC. ("FedEx" or "the Employer"). The Employer alleges that TEAMSTERS LOCAL 439 ("the Union" or "the Petitioner") engaged in conduct improperly affecting the results of the election, which was run by the National Labor Relations Board ("NLRB" or "Board") and resulted in a 33-12 vote in favor of the Union. As discussed herein, FedEx failed to provide any evidence, nor did any evidence develop at the Hearing, to substantiate any of the Employer's alleged Objections. Accordingly, the Hearing Officer should recommend that the Objections are overruled and the Union be certified as the exclusive bargaining representative of the Drivers at FedEx's Stockton Terminal.

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## STATEMENT OF PROCEDURAL AND RELEVANT FACTS

### A. Background.

The Union filed the Petition for Representation in this matter on January 7, 2015, seeking to represent the Drivers[1] at FedEx's Stockton Terminal. After the filing of the Petition, the Employer objected to the appropriateness of the bargaining unit, arguing that (part-time) Dockworkers should be included in the petitioned-for unit.[2] On February 12, 2015, the Regional Director's Decision and Direction of Election issued, and it rejected the Employer's argument. The election was held on March 12 and 13, 2015 and was supervised by the NLRB. (See Board Exhibits 1(a)-(f).)

The employees overwhelmingly voted in favor of the Union, 33-12. Despite this, on February 20, 2015, the Employer filed boilerplate election Objections. As was admitted by the Employer in its Motion to Postpone the Hearing on the Objections (said Motions, which were put into Evidence as Employer Exhibits 1-3, will be further discussed below), the Employer had no evidence in support of its Objections at the time of filing.[3] Accordingly, during the week of March 23, 2015, the Employer, through its attorneys, engaged in a fishing expedition and questioned employees in an effort to come up with evidence in support of its Objections.[4]

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[1] The initial Petition included Mechanics but was amended on January 16, 2015 to only include Drivers.

[2] FedEx advanced this argument even though its contention that Dockworkers must be included had been litigated and denied in several other cases. Specifically, the Union's petition for representation in this matter is similar to the one filed in Region 4 by Teamsters Local 107, Case No. 04-RC-133959 (hereinafter referred to as the "Cinnaminson case"). The Cinnaminson case involved a similar FedEx operation in New Jersey and the unit issue was the same: whether the Dockworkers should be included in the petitioned-for bargaining unit of Drivers. The Regional Director's Decision and Direction of Election in the Cinnaminson case was issued on September 10, 2014. In that decision, the Regional Director found that the Dockworkers do not hold an overwhelming community of interest with the Drivers, such that the Dockworkers must be included in the petitioned-for unit. Since that decision, Region 4 has issued similar decisions in at least ten (10) other cases known to Petitioner, including the instant case. See, e.g., Case Nos. 4-RC-134614, 22-RC-134873, 4-RC-13623, 10-RC-136185, 22-RC-136413, 5-RC-136673, 10-RC-138126, 6-RC-140779, 6-RC-141025.

[3] Such conduct is prohibited under the new Board rules, which require an Objecting party to include an offer of proof when filing objections to an election. See 29 CFR § 102.69. This offer of proof "shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony." 29 C.F.R. § 102.66(c).

[4] This fishing expedition and the circumstances surrounding this fishing expedition was the basis of the Union's "*Johnnie's Poultry*" charge (Case No. 32-CA-148787). As discussed below, that charge had no impact on the Objections Hearing other than the Company's convenient argument that it was the charge and fear of a further charge, and not the lack of evidence supporting its allegations, that compelled it not to call available employee-witnesses.

On May 14, 2015, the Region Noticed the Hearing on the Employer's Objections. In said Notice, the Region set forth the factual and legal issues in controversy. Specifically, the Region noted the following *allegations* raised by the Employer:

- "Union Agents" allegedly threatened eligible voters by telling them that they did not want to walk around with an arrow on their back;
- Bargaining unit members acting as agents of the Petitioner allegedly sent harassing and threatening communications, including text messages, to eligible voters;
- Supporters of the Petitioner who were allegedly acting as agents of the Petitioner told voters who did not support the Petitioner that they did not need to vote and that it did not matter if they voted;
- Employees who the Company asserts were acting as agents of the Petitioner made intimidating comments and/or yelled at eligible voters in a coercive manner;
- On the first night of the election, a bargaining unit employee allegedly called and told another employee (not in the bargaining unit) that he was being followed by agents of the Petitioner while he was working and driving his truck;
- Bargaining unit employees acting as "Union Agents" communicated to eligible voters that the Stockton facility was going to close;
- A supervisor heard a bargaining unit employee who the Employer asserts was acting as an agent of the Petitioner say that he would get fired if the Petitioner did not win the election, and this alleged statement was made in the presence of other bargaining unit employees;
- An employee not in the bargaining unit alleges that bargaining unit employees who acted as agents of the Petitioner told eligible voters that they would not be represented by the Petitioner after the Petitioner won the election unless they voted in favor of representation by the Petitioner;
- The same employee would also testify that agents of the Petitioner told eligible voters that if they did not vote for the Petitioner and the Petitioner won the election then they would be blacklisted;

- A bargaining unit employee alleges that photographs were taken against his will at a rally that the Petitioner allegedly held on the first night of the election;
- Employer contends that the rally was held in violation of *Peerless*.

Accordingly, the issues at Hearing were whether the above conduct occurred and, if so, was the conduct done by Union agents. As explained below, FedEx provided no evidence proving the conduct or agency relationship, and thus the Objections should be overruled.

**B. FedEx's Attempts To Cause Unnecessary Delay.[5]**

As noted above, on June 1, 2015, FedEx requested that the hearing be delayed/continued. (Employer Exhibit 1.) On June 2, 2015, the Regional Director denied FedEx's request. (Employer Exhibit 2.) On June 2, 2015, FedEx sought special permission to appeal the Regional Director's denial of its request. (Employer Exhibit 3.) The Union opposed both the request for special to permission to appeal and the request for a continuance. On June 5, 2015, the Board granted FedEx's request for special permission to appeal the Regional Director's denial. However, the Board denied FedEx's request to delay/continue the hearing.

The basis for FedEx's delay/continuance request, as set forth in its papers (Employer Exhibits 1-3), was its argument that (i) it could not prepare for its case because, if it did, it would be charged with more unlawful conduct; (ii) the hearing could bring out facts supporting the charges pending against it; and (iii) the hearing officer, who is from the Region where charges are pending, will be biased against it. As was set forth in the Union's Opposition, these bases did not support delaying/ continuing the Hearing in any way; nor did they prove out to be legitimate concerns at the Hearing.

First, the Employer's contention that it could not prepare its case-in-chief because it could be charged with further unlawful conduct was not an appropriate basis to postpone the Hearing. The Employer's fears of additional unfair labor practice charges would only materialize *if it violates the*

[5] FedEx's attempts to delay the Hearing began after it received the Notice of Hearing. Originally, the Hearing was set for May 26, 2015, but FedEx argued that it could not convene then and asked that the Hearing be put out until July to accommodate its attorney's vacation schedule. The Region declined to continue the Hearing until July and set it for Hearing on June 8. It is important to note that during the initial discussions for setting the Hearing date, FedEx did not raise any of its arguments that it somehow was prejudiced in calling witnesses. Indeed, FedEx asked, jointly with the Union, that the Hearing be convened in Stockton in order to accommodate employee witnesses. Rather, FedEx's *hamstrung* argument appeared a week before the Hearing in FedEx's attempts to further delay. With that said, as is discussed herein, it is clear from reviewing all of the evidence that FedEx's arguments for postponement surfaced because FedEx realized that it had no evidence to support its allegations.

*law*. Accordingly, as the Union argued in its Opposition, whether the Hearing was held in June, July or August, this issue will remain. In other words, if the Employer violates the law two months from now, it will still run the risk of being charged with engaging in unfair labor practices. The Union also noted in its Opposition that FedEx could address its concern by simply obeying the law.

Second, the Union noted in its Opposition that the Employer's concern that facts may develop in the Hearing that could impact the pending charges was also not a basis for postponement because, if such facts came out at Hearing, they would also come out during the investigation of the charges. With that said, the Hearing Officer alleviated any such concerns by prohibiting any questioning or development of facts related to the pending charges.

Third, the Employer's contention that the Hearing Officer would be biased was baseless and without any factual support. As noted by the Union in its Opposition, the Board's Rules and Regulations contain procedures setting forth the role and duties of the Hearing Officer and there was no evidence, prior to Hearing, that the Hearing Officer will deviate from those rules. Indeed, at Hearing, the Hearing Officer went out of his way to allow FedEx the opportunity to present its case, arguments, etc., and thus there is no legitimate basis for FedEx to argue that the Hearing Officer was, in any way, biased.

In sum, the Employer's reasons for seeking a delay were baseless and the Region and Board appropriately denied the Employer's requests.

### C. At Hearing, FedEx Relied On Its Procedural *Arguments* To Try To Excuse Its Failure To Provide Any Evidence.

The Board then conducted three days of hearing on FedEx's Objections, from June 8, 2015, to June 10, 2015. At Hearing, FedEx again argued for a delay/continuance of the Hearing, regurgitating its arguments from above. (Hearing Transcript ("Tr") at 25:12-28:15.) FedEx also argued that it was being prejudiced by going forward and that, as a result, it could not put on a case. Specifically, FedEx argued that it could not call witnesses because either it was afraid to meet with the witnesses and prepare them beforehand, or it was afraid that calling the witnesses would subject them to a charge from the Region. At Hearing, FedEx often referred to this argument as it being *hamstrung*. (Tr. 190:12-15; 212:2-12; 225:20-25.)

At the end of the Hearing, the Hearing Officer asked what effect if any this argument should have on review of the evidence. The answer is simple - none. FedEx's convenient argument is baseless. There is absolutely no authority, and FedEx did not provide any (nor could they), that calling a witness who is subpoenaed will result in an unfair labor practice charge against the subpoenaing party. Equally, FedEx did not provide any basis of why it could not "prep" witnesses, or why it would have to "prep" or coach witnesses beforehand. The Objections Hearing is a fact-finding investigation; all FedEx had to do was subpoena and call the witnesses in support of its allegations, and those witnesses could then testify truthfully about what occurred.

Finally and importantly, at Hearing FedEx admitted, through the testimony of J.W. Gurtis, that it had subpoenaed several employees, and that those employees were available and only a few miles from the location of the Hearing.[6] (Tr. 267:13-268:21; 323:11-324:3.) There was simply no legitimate reason why FedEx did not call those employees--other than what is obviously clear--those employees did not support FedEx's wild allegations.

**D. Even With The Leeway Given To It By The Hearing Officer, FedEx Produced No Evidence, As None Exists, In Support Of Its Wild Allegations.**

As noted above, any unreasonable concerns by FedEx of bias by the Hearing Officer did not prove out at the Hearing. Taking into account FedEx's *hamstrung* argument, the Hearing Officer allowed FedEx to put on any "evidence" it can to support its case. That evidence turned out to be hearsay and speculative testimony from management and unauthenticated documents (Exhibits 4-10.) Nevertheless, FedEx did not put on any direct evidence to corroborate its allegations. As argued by the Union at the Hearing and below, such hearsay, speculative and unauthenticated evidence should be rejected and FedEx's Objections should be overruled. A review of the scant "evidence" produced also demonstrates that FedEx's Objections were baseless and exaggerated.

FedEx called the Stockton Terminal Manager, J.W. Gurtis, to testify. He provided the following hearsay and speculative evidence:

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[6] FedEx requested, jointly with the Union, that the Board convene the hearing in Stockton for the convenience of the employee-witnesses.

- Gurtis heard about the rally from employees on March 12th, but he initially could not recall who he heard it from. When prompted, Gurtis agreed that Ken Capalla and Derek Razdoroff told him[7] about the rally. (Tr. 237:13-238:20; 241:5-12.)

- Capalla allegedly told Gurtis that when he drove by the AM/PM he could see a gathering of people behind the AM/PM, and that he could see some people in FedEx uniforms and a Teamster trailer. (Tr. 239:2-4.) Capalla also allegedly told Gurtis that Robert Nicewonger or Fred Trezvant called him to find out if he was attending the rally. (Tr. 239:20-240:2.)

- Matt Kimmel allegedly told Gurtis on the morning of March 13th that he had stopped by the rally and that some people in Teamster attire took out cell phones out and photographed him. (Tr. 242:9-243:9.)

- Gurtis also testified about the Stockton closure rumor and that he heard about the facility closure rumor from Dan O'Farrell, Sherry Cleveland (a non-bargaining unit employee), and Tim Purdy. (Tr. 244:16-245:6.) Specifically, Gurtis testified that in one of his weekly anti-Union meetings with the drivers, and in front of half a dozen employees, O'Farrell told Gurtis that he'd heard that the Stockton Terminal would be closed. (Tr. 246:12-247:7.) Gurtis testified that Tim Purdy allegedly said he was concerned that the facility would be closed, but that Purdy didn't say why he thought so and no other employees were present. (Tr. 249:2-23.) Sherry Cleveland allegedly also expressed concern about the facility closing to Gurtis. No other employees were present. (Tr. 250:2-251:6.)

- In mid-January, Mike Goewey allegedly reported to Gurtis that he was receiving harassing text messages from another employee about the election. Gurtis did not see the messages personally but he believes Sean Leonard was sending the messages because Goewey allegedly showed or told him the number that the messages were coming from and he looked it up. (Tr. 255:8-256:14.)

On cross-examination, Gurtis provided the following information:

- Goewey, Kimmel, Purdy, Murray, Capalla, Jeffrey Thompson, Jason Thompson and Juan Alvarez were all subpoenaed for the Hearing by FedEx; all working and available that week. (Tr. 267:13-268:21; 323:11-324:3.)

- In over 12 meetings about the campaign with drivers, the Stockton rumor came up only once. (Tr. 280:23-281:16.)

- Gurtis admitted he did not do anything to dispel the alleged rumor regarding the Stockton closure. (Tr. 284:8-13.) On cross, Gurtis also noted that Sherry

[7] The Union objected to most of the testimony of Gurtis and Elkins, FedEx's main witnesses, on hearsay grounds.

Cleveland stated that she thought the facility was closing because FedEx used to run territory out of the Modesto service center. (Tr. 289:2-4.)[8]

- With regard to the rally, Gurtis did not see or hear the AM/PM event, and testified that the event could not be seen nor heard from the dock or from the polling area. (Tr. 290:25-291:3; 291:22-292:6; 295:2-20.)

- Gurtis also admitted that he did not do anything to address the supposed harassment of Mike Gowey, except allegedly to advise Goewey as to how to make a complaint. (Tr. 299:2-300:1.)

- Gurtis admitted that he did not conduct an investigation into the rumor that the facility was going to close, ask any supervisors if they had ever said the rumor, or ask any of the supervisors who did ride-alongs whether they had started the rumor. (Tr. 304:3-5; 315:6-7; 318:20-23; 319:18-19; see also fn. 8.)

FedEx also called William "Al" Elkins, a supervisor to testify. He provided the following hearsay and speculative evidence:

- Elkins allegedly heard about the AM/PM gathering on March 12th from Tim Purdy. He was informed that about 20 people were gathering. He also allegedly heard it from Ken Capalla, who said that he didn't want anything to do with it. (Tr. 331:14-334:12.)

- Purdy allegedly complained to Elkins that he felt harassed by Dan O'Farrell, who approached him in the parking lot. The conversation between Purdy and Elkins about harassment allegedly occurred in January or February. (Tr. 334:13-336:11.)

On cross-examination, Elkins provided the following information:

- Elkins stopped at the AM/PM around 12:30 p.m. on March 12th and didn't notice any rally. (Tr. 339:22-340:7.) Elkins never saw or heard the rally that day and he was at the Terminal that whole day. (Tr. 344:25-345:3.)

- Cappalla and Purdy did not say they were mandated to attend the rally, and indeed, they did not attend the rally. (Tr. 341:17-25.)

- Purdy never said that O'Farrell yelled, intimidated or threatened him. (Tr. 346:11-21.)

- He did not recall specifically when the conversations with Purdy about the supposed harassment took place. (Tr. 348:2-349:12.)

[8] As discussed herein, it is clear that the rumor regarding the Stockton closure came from FedEx's conduct and, in no way, was it created or perpetuated by the Union as there would not be any reason for the Union to create a fear that the Terminal was going to close if the members voted in the Union.

- FedEx has a harassment policy. Elkins told his manager but did not investigate the complaint (proving that it was not truly a harassment complaint). (Tr. 351:4-352:2.)

FedEx's evidence was 1) that there was a rally/event at the AM/PM which could not be heard or seen at the Stockton Terminal (where the election was held); 2) that an employee, Matt Kimmel, was photographed (likely inadvertently from review of Employer Exhibit 4) at the rally/event; 3) that a bargaining unit employee, Dan O'Farrell, asked J.W. Gurtis about the rumor of the Stockton Terminal closing (along with other employees who suggested that the rumor was caused by the Employer's conduct); and 4) that two employees, Mike Goewey and Tim Purdy, allegedly felt harassed according to the management witnesses, but neither employee filed a complaint and there is no evidence of intimidation or threats directed to either employee.

Not only was this hearsay and speculative evidence unsubstantiated, it was refuted by Robert Nicewonger's direct testimony. Specifically, Nicewonger established that the rally did not violate the *Peerless Plywood* rule. Neither Nicewonger nor any other Union official or agent told anyone to flag down employees to attend the rally (Tr. 372:20-373:4), and he noted that the Union could not force anyone to attend the rally, and did not do so. (Tr. 373:3-4.) Nicewonger also testified credibly that the Petitioner did not direct, authorize, or condone any alleged misconduct. (Tr. 371:12-373:17.) Finally, Nicewonger established that, if any of the above speculative allegations occurred, it did not occur with the Union's authority or direction, and that the Union did not engage in any conduct to suggest that the employees who allegedly did the conduct were Union agents. (*Id.*)

Simply, reviewing the above with the allegations or issues at Hearing demonstrates the following:

- "Union Agents" allegedly threatened eligible voters by telling them that they did not want to walk around with an arrow on their back - **NO EVIDENCE WAS PRESENTED, NOT EVEN HEARSAY OR SPECULATIVE EVIDENCE.**

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- Bargaining unit members acting as agents of the Petitioner allegedly sent harassing and threatening communications, including text messages, to eligible voters - **THE HEARSAY EVIDENCE WAS THAT ONE EMPLOYEE, WHO WAS NOT ESTABLISHED TO BE AN AGENT OF THE UNION, SENT TEXT MESSAGES TO ONE SINGLE, OTHER EMPLOYEE. THE ALLEGED TEXTS WERE ALLEGEDLY VULGAR, BUT WERE NOT THREATENING, AND THERE IS NO EVIDENCE THAT THIS WAS DEEMED THREATENING. FINALLY, THERE IS ABSOLUTELY NO EVIDENCE THAT THE UNION CONDONED OR AUTHORIZED SUCH CONDUCT. INDEED, THE OPPOSITE IS TRUE, AS NICEWONGER NOTED HE DID NOT ISNTRUCT ANY EMPLOYEES TO SEND OUT TEXTS.**

- Supporters of the Petitioner who were allegedly acting as its agents told voters who did not support the Petitioner that they did not need to vote and that it did not matter if they voted - **NO EVIDENCE WAS PRESENTED, NOT EVEN HEARSAY OR SPECULATIVE EVIDENCE.**

- Employees who the Company asserts were acting as agents of the Petitioner made intimidating comments and/or yelled at eligible voters in a coercive manner - **SEEMINGLY, THIS ALLEGATION AROSE FROM DAN O'FARRELL'S CONVERSATION WITH TIM PURDY IN THE PARKING LOT. HOWEVER, ON CROSS, FEDEX'S MANAGEMENT WITNESSES ADMITTED THAT PURDY DID NOT CONVEY TO THEM ANY YELLING OR INTIMIDATING COMMENTS BY O'FARELL. THERE IS SIMPLY NO EVIDENCE, NOT EVEN HEARSAY OR SPECULATIVE EVIDENCE, IN SUPPORT OF THIS ALLEGATION.**

- On the first night of the election, a bargaining unit employee allegedly called and told another employee (not in the bargaining unit)[9] that he was being followed by agents of the Petitioner while he was working and driving his truck - **NO EVIDENCE WAS PRESENTED, NOT EVEN HEARSAY OR SPECULATIVE EVIDENCE.**

- Bargaining unit employees acting as "Union Agents" communicated to eligible voters that the Stockton facility was going to close - **THE EVIDENCE WAS THAT ONE EMPLOYEE, WHO WAS NOT ESTABLISHED TO BE AN AGENT OF THE UNION, ASKED GURTIS AT ONE OF THE ANTI-UNION WEEKLY MEETINGS HE HAD WITH EMPLOYEES WHETHER OR NOT THE STOCKTON FACILITY WAS GOING TO CLOSE. SIMILARLY, GURTIS NOTED THAT A NON-BARGAINING UNIT EMPLOYEE ASKED HIM THE SAME QUESTION AND THAT SHE HAD BELIEVED THE RUMOR COULD BE TRUE BECAUSE OF THE EMPLOYER'S CONDUCT. THERE IS NO EVIDENCE AND NO RATIONAL BASIS TO ARGUE THAT THE UNION WOULD TELL EMPLOYEES THAT STOCKTON WAS GOING TO CLOSE IF THEY VOTED IN THE UNION.[10]**

- A supervisor heard a bargaining unit employee who the Employer asserts was acting as an agent of the Petitioner say that he would get fired if the Petitioner did not win the election, and this alleged statement was made in the presence of other bargaining unit employees - **NO**

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[9] Even if one were to give FedEx's argument some validity, it would not apply to supervisors and non-bargaining unit employees, so there is no reason why it did not call such witnesses to the Hearing to substantiate its allegations. Again, the only logical conclusion is that the witnesses were not called because they did not support FedEx's spurious allegations.

[10] FedEx's exaggeration is evidenced by this allegation when it repeated during the Hearing and to the Region that it had eight employees to support this allegation. It is clear that the eight are the other employees who heard Dan O'Farrell ask Gurtis about this at a meeting and the non-bargaining unit employee and Tim Purdy who also asked Gurtis about it.

**EVIDENCE WAS PRESENTED, NOT EVEN HEARSAY OR SPECULATIVE EVIDENCE.**

- An employee not in the bargaining unit alleges that bargaining unit employees who acted as its agents told eligible voters that they would not be represented by the Petitioner after it won the election unless he voted in favor of representation by the Petitioner - **NO EVIDENCE WAS PRESENTED, NOT EVEN HEARSAY OR SPECULATIVE EVIDENCE.**
- The same employee would also testify that agents of the Petitioner told eligible voters that if they did not vote for the Petitioner and the Petitioner won the election then they would be blacklisted - **NO EVIDENCE WAS PRESENTED, NOT EVEN HEARSAY OR SPECULATIVE EVIDENCE.**
- A bargaining unit employee alleges that photographs were taken against his will at a rally that the Petitioner allegedly held on the first night of the election - **NO EVIDENCE THAT IT WAS TAKEN AGAINST KIMMEL'S WILL; INDEED, EMPLOYER EXHIBIT 4, THE PHOTOGRAPH, CONTRADICTS FEDEX'S ALLEGATIONS. MOREOVER, AS DISCUSSED BELOW, SUCH CONDUCT DOES NOT VIOLATE ESTABLISHED BOARD LAW.**
- Employer contends that the rally was held in violation of Peerless - **NO EVIDENCE OF A VIOLATION OF *PEERLESS*. THE EVENT/RALLY WAS NOT MANDATORY, WAS NOT HEARD OR SEEN AT THE FACILITY, AND WAS CLEARLY NOT UNLAWFUL ELECTIONEERING**

In addition to the allegations presented at the Notice of Hearing, FedEx tried repeatedly to expand the allegations at Hearing. For instance, it provided an "offer of proof" that was not in any way substantiated by the evidence presented at Hearing. Allegations of internet postings and systemic intimidation by the Union were simply not proven, in any way. FedEx's "offer of proof" should be seen for what it was, an exaggeration to try and sway the Hearing Officer or Board that it could have substantiated its Objections if it was not "*hamstrung*." As discussed herein the *hamstrung* argument was baseless and the offer of proof was baseless; neither should be given any credence or weight.[11]

## ARGUMENT

### A. FedEx Did Not Meet Its Burden Of Proof.

In a post-election objections hearing, the burden is on the objecting party to present evidence that the Board should set aside a representation election. (*Daylight Grocery Co. v. NLRB*, 678 F.2d 905, 909 (11th Cir. 1982); *Lamar Advertising of Janesville*, 340 NLRB 979 (2003); *Consumers Energy Co.*, 337 NLRB 752 (2002).) The objecting party faces a high burden to derail a Union

[11] Ultimately, the Hearing Officer rightfully rejected the offer of proof because the employee witnesses were able and available to testify and had received subpoenas. (Tr. 226:1-23.) In most basic terms, FedEx's misplaced strategy to call available and subpoenaed witnesses should not create a procedural issue for FedEx to self-servingly hide behind.

election run by the Board, because a Board-conducted election is presumed to be valid. (*SNE Enterprises, Inc.*, 348 NLRB No. 69 at 15 (2006) (citing *NLRB v. WFMT*, 997 F.2d 269 (7th Cir. 1993); *NLRB v. Service American Corp.*, 841 F.2d 191, 195 (7th Cir. 1988)); (see also, Tr. 6:25-7:11.) Indeed, the burden in this case is heavier because the vote margin (33-12) is large. (*Trump Plaza Associates*, 352 NLRB 628, 629-30 (2008) (citing *Avis Rent-A-Car System*, 280 NLRB 580, 581-582 (1986).) Finally, in addition to the high burden, the objecting party must demonstrate not only that the conduct occurred, but also that the conduct interfered with the free choice of employees to such a degree that it has materially affected the results of the election. (*SNE Enterprises, Inc.*, supra, at p. 16.)[12]

In this case, as argued above and herein, FedEx utterly failed to satisfy the evidentiary requirements and burden of proof to set aside a representation election. FedEx provided no direct testimony from any employee allegedly subjected to objectionable conduct. Instead, counsel for FedEx made an "offer of proof" as to what FedEx could supposedly show if employee witnesses were called to testify (see discussion above) and then relied on hearsay and speculative evidence. Simply, FedEx failed to proffer any direct evidence based on its convenient *hamstrung* argument, even though it was established that FedEx subpoenaed employees, the employees were available, and FedEx could have called those employees.

Moreover, under Board and federal law, when a party fails to call a witness under that party's control and that witness may reasonably be assumed to be favorably dispensed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. (See *Greg Construction Co.*, 277 NLRB 1411 (1985); *C & S Distributors, Inc.*, 321 NLRB 404 at p. 1, fn.2 (1996) (hearing officer should weigh party's failure to call a potentially corroborating employee bystander to corroborate party's witness in credibility determinations); see also, GUIDE FOR HEARING OFFICERS IN NLRB REPRESENTATION AND SECTION 10(K) PROCEEDINGS at p. 148.) Accordingly, legally and logically one can only assume that FedEx's failure to call the

[12] Under the Board's Rules and Regulations, the objecting party must furnish supporting evidence within seven (7) days of filing the objections. (Rule 102.69(a); *Craftmatic Comfort Mfg.*, 299 NLRB 514 (1990).) The Board only accepts evidence after the due date with a showing of good cause, or with a showing of good faith reasonable effort to comply with the rule. (*Goody's Family Clothing*, 308 NLRB 181 (1992); *Koons Ford of Annapolis*, 308 NLRB 1067 (1992).)

employee witnesses was based on the fact that the employees did not support their wild allegations. Indeed, as outlined above, FedEx could not even produce hearsay or speculative evidence in support of a majority of its Objections further demonstrating that its allegations and "offer of proof" were baseless.

In sum, FedEx submitted no reliable evidence to support any of the allegations contained in the Notice of Hearing or in its "offer of proof." It failed to prove that the Union, through agents or otherwise, has engaged in any conduct that interfered with the free choice of employees to choose a bargaining representative. Thus, the evidence presented at hearing is insufficient to overturn the election results.

1. FedEx failed to prove any threats, intimidation, harassment, or coercive treatment of voting unit employees by the Petitioner.

At Hearing, FedEx presented no direct testimony from any employee that the Union, through agents or otherwise, engaged in any conduct that threatened, intimidated, harassed or coerced eligible voters. Instead, it was revealed that this allegedly objectionable conduct was, if the inadmissible hearsay testimony of a biased witness can be credited at all, text messages allegedly directed to one employee, Mike Goewey, and a conversation in a parking lot between two employees, Tim Purdy and Dan O'Farrell. With regard to the latter, FedEx's own witness testified that Purdy had reported that Dan O'Farrell had merely spoken to him, that O'Farrell had not intimidated, yelled at, or threatened him. (Tr. 346:4-18.) With regard to the former, FedEx claimed that it could present evidence that Union agents "sent harassing and threatening communications, including text messages, to eligible voters." Yet FedEx presented only vague, hearsay testimony that one employee, Goewey, received two text messages that were allegedly unwelcome. (Tr. 252:14-255:13.) Moreover, the texts were not presented at Hearing and FedEx's witnesses denied having ever seen the texts. Thus, it was revealed at Hearing that FedEx's allegations of coercion and intimidation were overblown and unsupported by reliable evidence.

No evidence, not even hearsay or speculative evidence, was presented for most of FedEx's claims of threats or intimidation. For instance, FedEx claimed that Union agents told employees "they did not want to walk around with an arrow on their back." No witnesses corroborated this, not even with hearsay or speculative evidence. FedEx also claimed that there was systemic intimidation,

yet they produced no such evidence. Simply, FedEx did not present any, not even hearsay or speculative, evidence to corroborate a majority of its Objections.

2. FedEx did not prove that the Petitioner told employees the Stockton facility would close, or that they would lose their jobs, if they voted against the Union.

FedEx alleged that the Petitioner coerced, threatened, and intimidated voting unit employees by telling them that the Stockton facility would close. (Notice of Hearing, Objection No. 4; Tr. 193:12-20.) FedEx claimed that six bargaining unit employee-witnesses and three non-bargaining unit employee witnesses could testify to this effect. As noted above (fn. 10), this was an example of FedEx's exaggeration. It was revealed at Hearing that the six bargaining unit employees who could allegedly testify about this were simply present at a captive audience meeting held by the employer where another employee, Dan O'Farrell, asked Gurtis about the rumor. Based on Gurtis' testimony, the non-bargaining unit employees who could testify about this were apparently him and Sherry Cleveland.

However, FedEx presented absolutely no evidence that the Union originated or perpetuated the rumor that the Stockton facility would close (or that it would have a reason to do so). As set forth above, Gurtis testified that three people asked him about the possibility of the facility closing. One of these employees was an election observer for the Union, another was an election observer for FedEx, and the last did not belong to the bargaining unit. Apparently neither employee told Gurtis the source of this information, or why they thought it might be true, though the non-bargaining unit employee suggested it was FedEx's actions. (Tr. 249:19-21.)[13]

3. FedEx presented no evidence that the Union engaged in unlawful surveillance or otherwise threatened employees by taking photographs.

FedEx alleged that the Petitioner engaged in unlawful surveillance and/or threatened voting unit members by taking photographs and/or video of them. (Notice of Hearing, Objection No. 3.)

[13] While the Hearing Officer permitted FedEx to present hearsay evidence to support its allegation that the Petitioner spread these rumors, he gave the Petitioner no concomitant leeway to show that FedEx was actually the source of the rumor. (See generally, Tr. 272-278:10.) The only basis for the belief that the facility would be closed arose from FedEx's positioning of equipment outside of the Modesto facility. (Tr. 250:13; 288:10-289:14.) Logically, it makes little sense that a Union would threaten a facility would close if the Union should lose the election. Unions have no control over such operational decisions.

The only evidence offered to support this is Employer's Exhibit 4, a photograph of employee Matt Kimmel speaking with some other individuals who had gathered voluntarily at the AM/PM near the worksite on the night of March 12th. The photograph shows Kimmel in the background, facing away from the camera.[14] FedEx stated in its offer of proof that Kimmel was upset about the photograph. (Tr. 197:14-198:7.) Without Kimmel's testimony, his sentiments about the photograph are purely speculative. Even if this fact had been testified to by a witness (it was not), Kimmel could have claimed to be upset about being photographed with other Teamsters because his supervisor was interrogating him about it. FedEx submitted no evidence as to who took the photograph, hat it was taken by a Union employee or agent, or that the photograph was used for any impermissible purpose.

Even if FedEx could establish that a Union agent took the photograph, such conduct is not objectionable. Board decisions finding Union photography coercive--*Randell II*, *Pepsi-Cola* and *Mike Yurosek*--all deal with employees photographed in very specific circumstances: while exiting or entering a plant entrance near Union activity. (347 NLRB 591 (2006), 289 NLRB 736 (1988), 292 NLRB 1074 (1989), respectively.) In the paradigmatic case involving Union surveillance, *Randell II*, Union representatives took photographs of employees passing by an individual distributing pro-Union literature. (347 NLRB 591 (2006).) The Board concluded (upon forced reconsideration) that the photography was presumptively coercive, as it would discourage employees from refusing Union literature, in violation of the Section 7 right to *not* engage in Union activity. (*Id.* at 598.)

The instant matter is highly distinguishable on the basic facts. In stark contrast to the afore-mentioned scenario, Kimmel was photographed while *voluntarily* attending a gathering of other employees and Teamsters members. The only factually analogous Board decision, then, is *Nu Skin International*, where employees were photographed while voluntarily attending a Union-sponsored event. (307 NLRB 223, 224-225 (1994).) In *Nu Skin*, the Board overruled the employer's objection

[14] The photograph also does not support FedEx's hearsay evidence and offer of proof that Kimmel was surrounded and photographed. Rather, Employer Exhibit 4 shows an employee voluntarily there and talking with other individuals, not one who is upset or objecting to the photograph being taken.

because the Union photography did not involve the sort of campaign activity to ferret out anti-Union employees, finding instead that the photography was celebratory and innocuous. (*Id.*) The *Randell II* majority cited *Nu-Skin* as an example of where--as here--a photograph of an employee does not suggest any retaliatory or unlawful purpose.[15] Additionally, FedEx proffered no evidence that the photograph was taken by a Union agent, or that the use of photographs here tended to interfere with employee free choice in the election. (See *Sprain Brook Manor Home*, 348 NLRB No. 48 at p. 1 (2006).)

4. FedEx presented no evidence of Union electioneering or any violation of the *Peerless Plywood* rule.

FedEx alleged that the Petitioner engaged in unlawful electioneering. (Notice of Hearing, Objection No. 7.) Under the *Milchem* rule, unlawful electioneering occurs at or near the polls. (*Milchem, Inc.*, 170 NLRB 362 (1968); *U-Haul Co. of* Nevada, 341 NLRB 195 (2004) (*Milchem* rule does not apply to conversations with prospective voters unless the voters are in the polling area or in line waiting to vote); *C&G Heating and Air Conditioning, Inc., supra.*) FedEx proffered absolutely no evidence that the Petitioner engaged in electioneering anywhere near the polls.

Instead, FedEx's flamboyant allegation of electioneering appears to have been in actuality a gathering of employees and Teamster members at the AM/PM, and that five employees arrived to vote at the polls at the same time. (Tr. 198:15-200:1.) However, as discussed above, the gathering of employees could not be seen nor heard from the polling area, nor from the rest of the workspace. In fact, Gurtis and Elkins both admitted that it was impossible to hear or see the rally/gathering at the AM/PM from the polling area, or the location of the bargaining unit employees while at work. Further, the fact that five employees voted at the same time does not demonstrate any evidence of unlawful electioneering and, if any such unlawful conduct occurred, it would have been noted by the NLRB agent conducting the election. Simply, like the other allegations, this Objection is baseless.

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[15] *Randell II, supra* at 597-598, fn. 26 ("no objectionable conduct when union photographed employees who voluntarily attended a union picnic away from work and were told their pictures would be used to memorialize the occasion").

5. FedEx failed to prove the Union violated the Peerless Plywood rule.

FedEx alleged that the Petitioner violated the Peerless Plywood rule. (Notice of Hearing, Objection No. 8.) The Peerless Plywood rule forbids election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for an election. (Peerless Plywood Co., 107 NLRB 427, 429 (1954).) For Peerless violation, there must be a mandatory meeting, or some other involuntary exposure to campaigning. Examples of Union conduct that violates the rule involve forced exposure to campaigning, such as broadcasting Union songs to employees during shift changes. (See, e.g., Bro-Tech Corp., 330 NLRB 37 (1999).)

Similar to the other Objections, FedEx's allegation that the Union violated the Peerless rule is baseless and unsupported by any evidence. FedEx introduced no evidence that the Petitioner held any captive audience meetings, or that any employees were involuntarily exposed to Union campaigning within 24 hours of the election. Indeed, a Union cannot force anyone to meet or hear anything. Further, Gurtis and Elkins testified that the AM/PM gathering could not be heard or seen from the polling place or the dock. Moreover, both recognized, and Nicewonger testified, that there was no way for the Union to mandate employees to come to the AM/PM event.

Finally, the Company's argument that the event was on one of the roads going into the Terminal does not prove a Peerless violation. As was noted in the Hearing, there were two roads into the Terminal and there was no evidence that being on that road forced any employee to hear Union songs or chants. In cases with analogous facts, the Board has held that off-site rallies, even those using loudspeakers to broadcast messages, does not violate the Peerless rule. (N.L.R.B. v. Glades Health Care Ctr., 257 F.3d 1317, 1320 (11th Cir. 2001) (use of loudspeakers at rally fifty yards from worksite did not violate the Peerless rule where "there is no evidence that it intended to use them for any purpose other than to broadcast its message to those who voluntarily chose to attend the rally").) Without any supporting evidence, FedEx's Objections must be overruled.

6. FedEx has not satisfied its burden of proof to sustain objections.

As discussed above, in post-election hearings on objections, the burden is on the objecting party to show that objectionable conduct occurred during the critical period. This requires direct and admissible evidence. (See, e.g., In re Accubuilt, Inc., 340 NLRB No. 161 (2003). See also, Board

Rule 102.69(a); NLRB Casehandling Manual § 11392.6.) It is established Board law that without the timely receipt of evidence, the Regional Director should overrule the objections without any further processing. (*Magnolia Screw Prods, Inc. v. NLRB*, 548 F.2d 130 (6th Cir. 1976); *Star Video Entertainment, L.P.*, 290 NLRB 1010 (1980); *Georgia-Pacific Corp., Columbus Plant*, 197 NLRB No. 35 (1972).) FedEx did not call any percipient witnesses to corroborate its claims, and its case-in-chief consisted entirely of hearsay testimony. Indeed, FedEx failed to furnish any admissible evidence in support of the objections, as required by law. Thus, all Objections should be overruled and Petitioner should be certified as the exclusive bargaining representative of the bargaining unit.

### B. FedEx Presented No Evidence That Any Person Alleged To Engage In Objectionable Conduct Was The Agent Of The Union.

FedEx failed to establish agency relationship between the Union and any person alleged to have engaged in objectionable conduct. The burden of proving an agency relationship is on the party asserting its existence. (*Millard Processing Services*, 304 NLRB 770, 771 (1991), enfd. 2 F.3d 258 (8th Cir. 1993), cert. denied 510 U.S. 1092 (1992).) The agency relationship must be established with regard to the specific conduct that is alleged to be unlawful. (*Pan-Oston Co.*, 336 NLRB 305, 306 (2001).) Agency relationship exists where the agent has either actual or apparent authority to act and/or speak on behalf of a principal, here, the Union. (*In re Corner Furniture Discount Center, Inc.*, 339 NLRB No. 146 (2003).) Actual authority would arise if the Union expressly told the complaining third party that the employee in question was acting or speaking on its behalf. Apparent authority would arise if the Union engaged in conduct that would reasonably give the complaining third party reason to believe that the employee in question was acting on the Union's behalf. (See *Cornell Forge Co.*, 339 NLRB 733.) For either test, the question is what conduct did the Union do to the complaining third party to make that party think that the employee in question was acting on the Union's behalf. (See *id.* (where the Board noted that a letter to the Employer discussing employees alleged by third parties to be Union agents was not evidence of agency because the third parties had not seen the letter).)

FedEx failed to show that any person allegedly involved in objectionable activity was an agent of the Union. FedEx offered conclusory argument, not testimony, that Jorge Lopez, Sean

Leonard, Rickey Ricketts, Dan O'Farrell and Edgar Aguilar were Union agents, without furnishing any proof that other employees believed these individuals were acting with any authority from the Union. (Tr. 192:25-194:4.) At Hearing, FedEx's counsel tried to establish agency by arguing that the five aforementioned individuals attended Union meetings, supported the Union and/or campaigned for the Union. However, under established Board law, evidence that employee organized and spoke at the Union's campaign meetings, solicited authorization cards, and played a leading role in the campaign does not establish that he or she was a general agent of the Union. (*In re Corner Furniture Discount Center, Inc.*, 339 NLRB No. 146 (2003) (citing *United Builders Supply Co.* , 287 NLRB 1364, 1365 (1988) (holding that enthusiastic employee activist, who solicited and obtained signatures on authorization cards, organized and informed employees of Union meetings, and served as election observer for Union, was not general agent of Union under the principles of actual or apparent authority where, *inter alia*, the Union had its own admitted agent involved in the campaign).)

In the FedEx campaign, organizer Rob Nicewonger acted as Teamsters Local 439's agent. (Tr. 45:1-2.) Greg Chockley, organizer for the International, acted as the only other agent. (Tr. 111:25-112:12.) Chockley and Nicewonger had a strong presence in the campaign, meeting regularly with employees (on a nearly daily basis) and they, not the employees alleged to be agents by the Company, were the face of the Union during the campaign. (Tr. 370:5-21.) Simply put, there was no testimony that any employee understood or believed that Aguilar, Leonard, Lopez, O'Farrell and Ricketts acted with any authority of the Union.

Finally, FedEx similarly failed to establish that any agent of the Union made internet postings about the FedEx campaign.[16] FedEx attempted to attribute objectionable conduct to the Petitioner by making speculative allegations about internet postings without identifying any individual to have supposedly made such postings or ever producing said postings (apart from speculative evidence). (Tr. 118:1-120:7.) FedEx made no showing whatsoever that any of the online postings were created by Union agents or that the postings were viewed by eligible voters, or any other showing of the postings' relevance to the instant matter.

[16] Nor was such an allegation appropriately before the Hearing Officer.

Ultimately, FedEx used the "agency theory" at hearing to troll for information about the Union's organizing campaign, and about its employees' Section 7 activities. FedEx's attorneys did this by asking questions that were not designed to elicit any information relevant to the Objections proceeding. For example, FedEx asked many improper questions directed at discovering which employees were involved in the organizing committee and attended Union meetings. (Tr. 94:7-9; 172:2-174:22.) Similarly, FedEx sought information about conduct that was far outside of the relevant, critical period before the election. (Tr. 102-104.) This abuse of process only served to give FedEx more information to use against its employees, and did not produce any relevant evidence in support of its Objections. Simply, FedEx did not prove agency, did not prove its allegations, and its trolling via questioning and subpoenas[17] was inappropriate.

### C. Even If The Employer Hearsay Testimony And Speculative Evidence Of The Employer Is Accepted And Credited, The Alleged Conduct Would Not Warrant Overturning The Election Result.

Even if all of the Employer's evidence were admissible, it is insufficient, in its totality, to warrant overturning the election result. The Board has long held isolated or de minimus conduct insufficient to sustain objections. (*C&G Heating and Air Conditioning, Inc.*, 356 NLRB No. 133 (2011); *Chicagoland Television News, Inc.*, 330 NLRB 630 (2000); *Bon Appetit Management Co.*, 334 NLRB 1042 (2001) (describing standard for whether conduct is de minimis); *Sir Francis Drake Hotel*, 330 NLRB 638 (2000) (margin of election results can be a factor).) Here, FedEx's drivers voted overwhelmingly in favor of the Petitioner. FedEx made absolutely no showing that the conduct at issue, even if complained of by one or two employees, affected this result.

### D. FedEx Should Be Sanctioned For Its Abuse Of Process.

While the Board generally does not award litigation expenses, it has recognized an exception to that policy in order to discourage frivolous litigation. (See *International Union of Electrical, Radio and Machine Workers, AFL-CIO [Tiidee Products, Inc.]* v. *N.L.R.B.*, 426 F.2d 1234 (1970), cert. denied 400 U.S. 950 (1970).) *Tiidee Products* held that, in order to effectuate the policies of the Act and to serve the public interest, the Board has the authority to award costs and expenses in situations when a respondent engages in frivolous litigation. (*Id.* at 1236-1237.) The Board found

[17] The Union's Petitions to Revoke FedEx's subpoenas were appropriately granted by the Hearing Officer.

that an award of litigation costs is appropriate when the offending party intentionally makes facially meritless arguments in a clear attempt to burden the processes of the Board, and in cases when there are no significant factual controversies. (See, e.g., *Fetzer Broadcasting Co.*, 227 NLRB 1277 (1977); *J.P. Stevens & Co.*, 239 NLRB 738, 770-772 (1978).) Where a party forces a proceeding and there are no "debatable" issues, an award of litigation expenses may be appropriate. (*Heck's, Inc.*, 215 NLRB 765 (1974).)

Here, FedEx filed objections to an election won handily by the Petitioner, without any supporting evidence. After filing the objections, FedEx went on a fishing expedition to gather evidence.[18] Prior to the hearing, FedEx failed to comply with the Board's evidentiary requirements and submitted overbroad and abusive subpoenas to the Petitioner. At hearing, FedEx presented no direct testimony to support its meritless position, based its entire case on an "offer of proof" for evidence it was unprepared to present,[19] and, through its counsel, spent much of the first day of hearing soliciting information about its employees' protected concerted activity without making any showing of its relevance to the issues before the Hearing Officer. Such conduct, shrouded by meritless and frivolous Objections, was clearly an abuse of process. The Board should permit no employer, or Union for that matter, to use its investigatory procedures to abuse process and delay certification. The members' votes should count and FedEx should not be allowed to delay that. Thus, the Petitioner requests that its litigation expenses be awarded and that all other available sanctions be brought against FedEx, to deter such frivolous litigation and abuse in the future.

## CONCLUSION

Based on the foregoing and the record as a whole, the Petitioner respectfully requests that Employer's Objections No. 1 through 9 be overruled and that the appropriate certification issue in this matter.

[18] The underwhelming presentation of evidence, and lack of employee-witnesses actually called to testify, shows how unsuccessful this expedition was.

[19] Likely because such evidence does not exist.

Dated: June 17, 2015.

BEESON, TAYER & BODINE, APC

By: _____
COSTA KERESTENZIS
STEPHANIE PLATENKAMP
Attorneys for Union/Petitioner

## PROOF OF SERVICE

## STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I declare that I am employed in the County of Sacramento, State of California. I am over the age of eighteen (18) years and not a party to the above-related action. My business address is 520 Capitol Mall, Suite 300, Sacramento, California, 95814-4714. On this day, I served the foregoing:

**PETITIONER'S POST-HEARING BRIEF**

☒ By Mail to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Beeson, Tayer & Bodine, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business in a United States mailbox in the City of Sacramento, California.

☐ By Personal Delivering a true copy thereof, to the parties in said action, as addressed below in accordance with Code of Civil Procedure §1011.

☐ By Overnight Delivery to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(c), by placing a true and correct copy thereof enclosed in a sealed envelope, with delivery fees prepaid or provided for, in a designated outgoing overnight mail. Mail placed in that designated area is picked up that same day, in the ordinary course of business for delivery the following day via United Parcel Service Overnight Delivery.

☐ By Facsimile Transmission to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(e).

☒ By Electronic Service. Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed in item 5. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury that the foregoing is true and correct. Executed June 17, 2015, at Sacramento, California.

Annette Kenney